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No. 91-288

In the Supreme Court of the United States

OCTOBER TERM, 1991

BONG Y. KIM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly granted summary judgment in an *in rem* forfeiture action.

2. Whether currency brought into the United States in violation of the reporting requirements of 31 U.S.C. 5316 is subject to forfeiture under 31 U.S.C. 5317 only if the owner of the currency has knowledge of the reporting requirements.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 931 F.2d 52 (Table). The memorandum and order of the district court (Pet. App. A4, A5-A15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1991. A petition for rehearing was denied on April 11, 1991. Pet. App. A3. The petition for a writ of certiorari was filed on July 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a civil *in rem* action in the United States District Court for the Eastern District of Pennsylvania, the United States was granted summary judgment against approximately $350,000 of petitioner's currency. The district court held that the currency was subject to forfeiture (1) under 31 U.S.C. 5317(c), because it had been transported into the United States without compliance with the applicable reporting requirements, in violation of 31 U.S.C. 5316; and (2) under 18 U.S.C. 981(a)(1)(C) (Supp. IV 1986), because it was the subject of transactions structured to avoid the filing of currency transaction reports, in violation of 31 U.S.C. 5324.[1] The court of appeals affirmed. Pet. App. A1-A2.

1. In late 1987, petitioner and Gary Flack devised a plan for bringing approximately $350,000 in United States currency from Korea into the United States. The money was purportedly the proceeds of a sale of property that petitioner had inherited. Pet. App. A6; Gov't C.A. Br. 5.

In accordance with the plan, petitioner sent Flack $3000 for travel expenses in early December 1987. Later that month, Flack flew to Korea, and several days later he returned to the United States with $349,700 in currency. Petitioner met Flack at the Los Angeles International Airport, and the two then went to the home of petitioner's cousin, where Flack gave petitioner the money. Flack told petitioner that when Flack passed through customs at the airport,

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[1] In November 1988, Congress repealed 18 U.S.C. 981(a)(1)(C) (Supp. IV 1986), and the statute was replaced by an amended version of 18 U.S.C. 981(a)(1)(A). The repeal and replacement of former Section 981(a)(1)(C) are not material to the issues raised in the petition. See Pet. App. A5 n.2.

he had hidden some of the currency in his boots and the rest of it in his luggage. Pet. App. A6; Gov't C.A. Br. 5-6.

In early January 1988, petitioner tried to convert the $349,700 to a cashier's check at the Bank of America in Los Angeles. When a bank employee told petitioner that a currency transaction report (CTR) would have to be filed, petitioner left the bank without converting the currency.[2] Thereafter, petitioner took the currency back to Allentown, Pennsylvania, where he lived. Pet. App. A6; Gov't C.A. Br. 6.

Petitioner knew that he could not make deposits of $10,000 or more in currency without attracting attention. After studying a pamphlet from a bank regarding the requirement of filing CTRs for such deposits, he concluded that he could avoid the requirement by making deposits of less than $10,000 each. Accordingly, from January 6 to 19, 1988, he made 36 deposits of $8500 to $9600 in currency at 11 banks. By January 21, 1988, he had consolidated these 36 deposits into four separate accounts: a certificate of deposit at Firstrust Savings Bank, a certificate of deposit at Hill Financial Savings Association, and a savings account and a checking account at Meridian Bank. Pet. App. A6-A7; Gov't C.A. Br. 6-7.

As part of these efforts, on January 15, 1988, petitioner attempted to open an account at the Bank of Pennsylvania with $8500 in cash. When the teller told him that a CTR would have to be filed for that transaction, petitioner asked to buy a cashier's check

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[2] As discussed *infra*, the Internal Revenue Service requires the filing of currency transaction reports when a financial institution is involved in a monetary transaction in an amount of $10,000 or more. 31 U.S.C. 5313; 31 C.F.R. 103.22.

with the money. When the teller said that a CTR would also be required for that transaction, petitioner left the bank without transacting any business. Gov't C.A. Br. 7.

Between January 22 and 25, 1988, agents of the Internal Revenue Service (IRS) interviewed employees of the banks where petitioner had made his deposits. The bank employees informed the agents of the details of petitioner's transactions. Gov't C.A. Br. 7-8.

On February 2, 1988, IRS Special Agent Wayne Campbell contacted petitioner and advised him of his *Miranda* rights. Petitioner then made a statement in which he admitted that he had conspired with Flack to transport the currency into the United States. He also admitted that he knew about the CTR requirements and had attempted to avoid the filing of CTRs on his deposits. Finally, he admitted that as of February 1, 1988, approximately $330,000 of the money that Flack had transported into the United States was deposited in accounts at Firstrust Savings Bank, Hill Financial Savings Association, Meridian Bank, and Northeastern Bank. Petitioner gave Agent Campbell a diary that listed the amounts of money deposited in the four consolidated accounts and identified the sources of those deposits. On January 29, 1988, on the basis of an affidavit provided by Agent Campbell, a United States magistrate authorized seizure warrants for the funds in the four consolidated accounts, and the funds were seized from the accounts. Gov't C.A. Br. 8-9.

In March 1988, the government filed a complaint seeking forfeiture of the seized currency. Petitioner filed a claim of ownership of the currency and an answer to the complaint. The district court later stayed

the forfeiture proceeding pending disposition of the criminal proceedings that had been initiated against petitioner and Flack. Gov't C.A. Br. 3.

2. The government charged petitioner and Flack with conspiring to transport $349,000 in currency into the United States without filing the report required under 31 U.S.C. 5316.[3] In addition, petitioner was charged with 39 counts of structuring bank transactions to avoid the filing of CTRs, in violation of 31 U.S.C. 5324.[4] On December 6, 1988, petitioner

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[3] 31 U.S.C. 5316(a) provides in relevant part:

> [A] person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—
>
> (1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—
>
> (A) from a place in the United States to or through a place outside the United States; or
>
> (B) to a place in the United States from or through a place outside the United States * * *.

Subsection 5316(b) prescribes the information that reports required under subsection 5316(a) must contain and authorizes the Secretary of the Treasury to prescribe further requirements by regulation.

[4] 31 U.S.C. 5324 provides in relevant part:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> * * * * *
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

The provision to which Section 5324 refers—Section 5313(a)—requires domestic financial institutions to file CTRs when they are involved in cash transactions of the type and amount described in regulations promulgated by the Secretary of the Treasury. 31 U.S.C. 5313(a). Those regulations generally

pleaded guilty to the conspiracy charge and two of the structuring charges. The government agreed to drop the remaining structuring charges in return for petitioner's plea and cooperation. On January 18, 1989, Flack also pleaded guilty to conspiracy to violate 31 U.S.C. 5316. Gov't C.A. Br. 9-10.

At the hearing regarding petitioner's plea, the government described the factual basis for the plea, including petitioner's statement to the IRS agents; documents showing that neither petitioner nor Flack had filed the customs reporting forms required for transporting the $349,000 into the United States; documents showing that petitioner had made over 30 deposits of approximately $9000 each between January 6, 1988, and January 19, 1988; and a consensually monitored telephone call between petitioner and Flack in which Flack admitted that he had illegally failed to file the required customs forms. Petitioner admitted that the factual basis set forth by the government was correct and that he had committed the three offenses to which he was pleading guilty. Gov't C.A. Br. 10.

3. After the criminal proceedings concluded, the government moved for summary judgment in the forfeiture proceeding. In support of that motion, the government submitted, *inter alia*, petitioner's plea colloquy, petitioner's statement to the IRS agents, Flack's guilty plea, and the affidavit of IRS Agent Campbell in support of the seizure warrant, which detailed his investigation of petitioner's deposits of the currency. Pet. App. A6-A8, A10-A11. The district court held that the government had established probable cause for forfeiture by demonstrating that

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require that CTRs be filed for transactions involving $10,000 or more in currency. See 31 C.F.R. 103.21-103.27.

the currency was traceable to violations of 31 U.S.C. 5316 and 5324. Pet. App. A10-A11. The court further held that petitioner had not raised any genuine issue of material fact. *Id.* at A11. The court rejected petitioner's contention that use of his guilty plea should be narrowly circumscribed.[5] The court also rejected the argument that actual knowledge of the reporting requirement of 31 U.S.C. 5316 is required for forfeiture under 31 U.S.C. 5317(c). Pet. App. A13-A14. The court held that, in any event, the currency in this case was subject to forfeiture not only under Section 5317(c) but also under 18 U.S.C. 981 (a)(1)(C) (Supp. IV 1986). Pet. App. A14-A15.

4. The court of appeals affirmed by judgment order. Pet. App. A1-A2.

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[5] Petitioner had argued that (1) in return for his guilty plea, the government had orally promised not to seek forfeiture of the currency; (2) only the amount of money involved in the two structuring counts to which he pleaded guilty should be subject to forfeiture under 18 U.S.C. 981(a)(1)(C) (Supp. IV 1986); and (3) his plea should not be used to support the government's claim for forfeiture under 31 U.S.C. 5317(c) because that claim was added to the forfeiture complaint after petitioner entered his plea. Pet. App. A11-A12. The court held that petitioner was estopped from advancing the first argument because at the plea hearing "[petitioner], while under the advice of counsel, was specifically questioned and denied that any promises were made to him outside of the ones set forth in the plea agreement." *Id.* at A12. As to petitioner's second and third arguments, the court observed that "there is no requirement that a defendant be informed of the collateral consequences of pleading guilty." *Ibid.* In addition, the court held that the amount of money subject to forfeiture under Section 981 was not limited to the amount of money involved in the two structuring counts, because there was evidence in addition to the plea agreement that supported the government's Section 981 claim. Pet. App. A13 n.8.

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the district court erred when it granted summary judgment against his currency. He argues that (1) some of the government's documentary evidence was unreliable and (2) a material issue of fact existed as to whether petitioner knew of the reporting requirements of 31 U.S.C. 5316. These fact-bound claims are without merit.

Rule 56(c) of the Federal Rules of Civil Procedure provides that the court "shall" grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This Court has emphasized that the standard set forth in Rule 56 "[b]y its very terms * * * provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-248. Summary judgment is foreclosed only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Thus, the nonmoving party cannot defeat a properly supported summary judgment motion by reasserting factually unsupported allegations in the pleadings. *Id.* at 248-249; see *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986). Rather, the nonmoving party must present "significant probative evidence" sufficient "for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249.

As the district court recognized (Pet. App. A10), in civil forfeiture actions, the government has the initial burden of establishing probable cause to believe that there is a substantial connection between the property to be forfeited and the criminal activity defined in the relevant forfeiture statutes. See, *e.g.*, *United States* v. *7715 Betsy Bruce Lane*, 906 F.2d 110, 112-113 (4th Cir. 1990); *United States* v. *$55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984). Thus, in this case the government was required to show that the defendant currency could be traced to violations of 31 U.S.C. 5316 and 5324—*i.e.*, that it had been knowingly transported into the United States without filing the required customs report and had been the subject of bank transactions structured to avoid the filing of CTRs—and was therefore subject to forfeiture under 31 U.S.C. 5317(c) and 18 U.S.C. 981(a)(1)(C) (Supp. IV 1986), respectively. Once the government made this showing, the burden shifted to petitioner to demonstrate by a preponderance of the evidence that the currency was not subject to forfeiture. *$55,518.05 in U.S. Currency*, 728 F.2d at 196.

The district court correctly concluded that the government "clearly met its burden [of] demonstrating probable cause to believe the property is subject to forfeiture under both 18 U.S.C. § 981 and [31] U.S.C. § 5317." Pet. App. A10. The government's evidence included petitioner's guilty plea, Flack's guilty plea, petitioner's admissions during the plea proceeding, his statement to Agent Campbell, and Agent Campbell's affidavit in support of the seizure warrant. As the district court found, that evidence established a clear connection between petitioner's currency and the criminal activity defined by 31 U.S.C. 5316 and 5324. Pet. App. A10-A11.

As in the courts below, petitioner contends that some of the government's evidence was "flawed" (Pet. 10), but none of the alleged "flaw[s]" raises a genuine issue of material fact. Although petitioner criticizes the district court's reliance on petitioner's diary (Pet. 9-10), petitioner himself told IRS agents that it was "his personal diary" and voluntarily turned it over to them for copying. C.A. Supp. App. 182. Moreover, as the district court recognized, even without the diary the evidence was sufficient to warrant summary judgment. Pet. App. A8 n.3. Petitioner also errs in attacking (Pet. 10) the district court's reliance on Agent Campbell's memorandum of his interview with petitioner and on the agent's affidavit in support of the seizure warrant. Although the government initially submitted unsigned copies of the memorandum and the affidavit, it later presented a signed and dated copy of the affidavit, and a signed and dated affidavit of Agent Campbell describing the circumstances in which petitioner provided his statement and diary to the agent. C.A. Supp. App. 278-290. This procedure was fully consistent with Fed. R. Civ. P. 56(e) (permitting the filing of additional affidavits in support of summary judgment motion). Although petitioner challenged the procedure by which the documents were submitted, he did not challenge their contents. C.A. Supp. App. 313. The district court was therefore correct in concluding that petitioner's challenge to the government's evidence did not raise any genuine issue of material fact. See Pet. App. A8 n.3.

Petitioner argues, finally, that summary judgment was precluded by the disputed issue of "whether the alleged violations were committed without [his] knowledge." Pet. 11. Petitioner asserts that the issue of knowledge was material to the existence of a

statutory defense under 18 U.S.C. 981(a)(2).[6] Petitioner cannot now rely on Section 981(a)(2) to identify a material dispute, however, because he did not assert a defense under that provision in the district court. Gov't C.A. Br. 22. Because petitioner plainly bore the burden of asserting that defense in the district court, his failure to do so bars him from relying on it now as a basis for challenging the district court's entry of summary judgment. See *Anderson*, 477 U.S. at 248 (substantive law governing proof at trial identifies which disputes are "material" for purposes of Fed. R. Civ. P. 56(c)).

2. Petitioner further contends (Pet. 12-15) that the currency is not subject to forfeiture under 31 U.S.C. 5317 because he did not have knowledge of the reporting requirements of 31 U.S.C. 5316. The courts below correctly rejected that contention. Knowledge of the reporting requirements is not a condition of forfeiture under Section 5317, and even if it were, such knowledge existed in this case.

The text of the relevant provisions makes clear that knowledge of the reporting requirements prescribed in Section 5316 is not required for civil forfeiture under Section 5317. Section 5317(c) provides in relevant part:

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[6] 18 U.S.C. 981(a)(2) provides:

> No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

As explained above, Section 981 authorizes forfeiture of currency involved in transactions structured to avoid the filing of CTRs, in violation of 31 U.S.C. 5324.

> If a report required under section 5316 with respect to any monetary instrument is not filed * * *, the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States * * *.

Section 5316 provides that a report is required whenever "a person or an agent or bailee of the person * * * knowingly—(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 * * * to a place in the United States from or through a place outside the United States." 31 U.S.C. 5316(a)(1)(B). The statutory language thus indicates that money must be "knowingly transport[ed]" to be subject to forfeiture, but it contains nothing to suggest that knowledge of the statutes themselves is required. Accordingly, most courts to consider the issue have concluded that no such knowledge is required. See *United States* v. *$359,500 in U.S. Currency*, 828 F.2d 930, 932 (2d Cir. 1987) (citing cases); see also, *e.g.*, *United States* v. *$47,980 in Canadian Currency*, 804 F.2d 1085, 1090 (9th Cir. 1986), cert. denied, 481 U.S. 1072 (1987); *United States* v. *$122,043 in U.S. Currency*, 792 F.2d 1470, 1474 (9th Cir. 1986).[7]

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[7] None of the cases relied on by petitioner (Pet. 13) presents a conflict requiring resolution by this Court. Both *United States* v. *Granda*, 565 F.2d 922, 925-926 (5th Cir. 1978), a criminal case, and *United States* v. *$48,595*, 705 F.2d 909, 914 (7th Cir. 1983), involved false statements on customs reporting forms that may have been caused by the inartful drafting of the forms, rather than by any criminal intent. In *United States* v. *One (1) Lot of $24,900.00 in U.S. Currency*, 770 F.2d 1530, 1536 (11th Cir. 1985), while the court upheld the dismissal of a forfeiture complaint because it failed to allege that the transporter of the currency knew of the reporting requirements, the court emphasized that "nothing in the lan-

Petitioner nonetheless argues (Pet. 13) that the phrase "knowingly transport[ed]" should be interpreted to apply only to currency transported in "willful[] violat[ion]" of the reporting requirement. Such a judicial rewriting of statutory text would be particularly inappropriate in this context. Congress expressly included the "willful[] violat[ion]" of the reporting requirements as an element of the *criminal offenses* prescribed in 31 U.S.C. 5322. The omission of any similar language in the *civil forfeiture* provisions strongly suggests that Congress did not intend willfulness to be an element of proof in forfeiture proceedings. See *$359,500 in U.S. Currency*, 828 F.2d at 933.

In any event, assuming *arguendo* that knowledge of the reporting requirements were a condition of civil forfeiture, that condition was satisfied in this case. It is undisputed that Flack was aware of the reporting requirements when he transported the money into the United States. Flack admitted as much in a phone call to petitioner and by later

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guage of the statute or its legislative history indicates that the innocence of the *nontransporting* owner or claimant prevents forfeiture." Petitioner was the nontransporting owner of the currency at issue here, and therefore under *$24,900 in U.S. Currency* petitioner's asserted lack of knowledge did not bar forfeiture. As discussed *infra*, the transporter of the currency in this case, Flack, was well aware of the reporting requirements, and his knowledge satisfied any knowledge requirement in the statute. Finally, petitioner's repeated reliance (Pet. 12, 14) on *United States* v. *$359,500 in U.S. Currency*, 645 F. Supp. 638 (W.D.N.Y. 1986), remanded, 828 F.2d 930, 936 (2d Cir. 1987), is misplaced. On appeal of that decision, the Second Circuit expressly rejected the district court's holding that knowledge of the reporting requirement of Section 5316 is a condition of forfeiture under Section 5317. 828 F.2d at 932-934.

pleading guilty to conspiring to violate 31 U.S.C. 5316. Gov't C.A. Br. 10. Flack's culpability satisfied any requirement that currency be transported into the United States with knowledge of the reporting requirements. As the district court observed, because the proceedings were *in rem*, the government was required only to show that the currency was involved in a statutory violation; the government was not required to show that petitioner, or any other particular individual, committed the violation. Pet. App. A10.

Moreover, petitioner admitted to criminal knowledge of the reporting requirements by pleading guilty to conspiring with Flack to violate Section 5316. See *United States* v. *Arriaga-Segura*, 743 F.2d 1434, 1436 n.2 (9th Cir. 1984) (guilty plea constitutes admission of all facts necessary for conviction). Petitioner may not now attempt to avoid the consequences of his plea by disavowing culpability. See, *e.g.*, *Sandstrom* v. *Chemlawn Corp.*, 904 F.2d 83, 87-88 (1st Cir. 1990).[8]

Finally, petitioner's present disclaimer of knowledge, even if accepted at face value, does not suffice to show that he was unaware of the reporting requirements. Here, as in his plea colloquy, petitioner carefully circumscribes his assertion of ignorance of the law. Petitioner claims that "he was unaware [that] Flack was not going to file the [customs] form upon arrival in Los Angeles." Pet. 11. Petitioner

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[8] Contrary to petitioner's suggestion (Pet. 13), the "innocent owner" defense in 18 U.S.C. 981(a)(2) does not apply to property subject to forfeiture under Section 5317. The Section 981(a)(2) defense applies only to property subject to forfeiture under Section 981. 18 U.S.C. 981(a)(1)(A) and (a)(2).

does not dispute, however, that he was put on notice of the filing requirement when Flack told petitioner about going through customs with the money hidden in Flack's boots and luggage. See Pet. App. A6. At that point, the money was still subject to the filing requirement prescribed in Section 5316. Section 5316 applies when a person "transports, is about to transport, *or has transported*" more than $10,000 into the United States. 31 U.S.C. 5316(a)(1)(B) (emphasis added). That requirement, moreover, applied not only to Flack, as the person who transported the currency, but also to petitioner, as the person who aided in the transportation of the money and who received it. 31 C.F.R. 103.23(a) and (b). In short, petitioner was required to file a customs report at the time the money came into his hands, and there was uncontradicted evidence that at that point he was on notice of that requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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